

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

DALE CARLOW,)	
)	
Petitioner)	
)	
v.)	Crim. No. 93-59-B
)	
UNITED STATES OF AMERICA,)	
)	
Respondent)	

***RECOMMENDED DECISION TO DENY DEFENDANT'S MOTION
FOR COLLATERAL RELIEF PURSUANT TO 28 U.S.C. § 2255***

Dale Carlow moves the Court to vacate, set aside or correct his sentence pursuant to 28 U.S.C. § 2255 (1994). A prior order affirming this Court's recommendation to dismiss without a hearing all but one of the petitioner's various claims was entered on December 30, 1996. The remaining claim relates to the petitioner's contention that he received ineffective assistance of counsel when, at the sentencing hearing, his lawyer failed to request an evidentiary hearing regarding the actual amount of monetary loss the victims of his crimes incurred. After careful consideration of the record, the Court recommends that the motion be denied without an evidentiary hearing.

A section 2255 motion may be dismissed without an evidentiary hearing if the "allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact." *Dziurgot v. Luther*, 897 F.2d 1222, 1225 (1st Cir. 1990) (per curiam) (internal quotations and citation omitted). Even if Carlow's allegations were accepted as true, they would be insufficient to justify relief in this matter.

The petitioner contends that he was denied effective assistance of counsel at the sentencing hearing because his counsel failed to request an evidentiary hearing on the issue of the monetary loss that resulted from his criminal activities. Carlow argues that the actual loss his victims suffered as a result of his mail and wire fraud activities was less than that reflected in the evidence before the court because he either refused delivery of some goods or had returned them voluntarily. The respondent contends that the issue of loss was fully examined at the trial and in the pre-sentence investigation report, and that Carlow's counsel was in no way ineffective for failing to request a hearing at the sentencing.

Ineffective assistance of counsel claims are reviewed under the familiar two-prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). Specifically, a petitioner must show the Court that counsel's performance was deficient. *Id.* at 687. The petitioner also must show that, but for counsel's deficient performance, the outcome of the trial would have been different. *Id.* There is no requirement that the Court analyze these separate prongs in any particular order; a failure to show prejudice will suffice to defeat a particular claim, without reference to the level of counsel's performance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.*

Although Carlow's counsel could have requested an evidentiary hearing, he was not constitutionally deficient in failing to do so. Pursuant to *Strickland*, a counsel's strategic decisions at the trial are clothed with a presumption of reasonableness. *Id.* at 689; *see also Lema v. United*

States, 987 F.2d 48, 51 (1st Cir. 1993). A knowledgeable, competent attorney could have concluded that such a hearing was not necessary or even desirable in light of the evidence that already had been presented at the trial. Moreover, there is no evidence that the court even would have granted such a hearing had the request been made. Whether to grant an evidentiary hearing is within the sound discretion of the trial court. *United States v. Shattuck*, 961 F.2d 1012, 1014-1015 (1st Cir. 1992). Carlow has failed to demonstrate that "[a]n evidentiary hearing [would have been] [] the only reliable way to resolve' the 'victim loss' calculation, *see* U.S.S.G. § 6A1.3, p.s., comment, nor that one would [have been] [] useful." *Shattuck*, 961 F.2d at 1015. Not only did the court have before it at the sentencing information relating to monetary loss in the form of the pre-sentence investigation report, it had presided over a trial at which many witnesses testified to the amount and nature of their respective losses. The trial court enjoys broad discretion in selecting a loss figure for sentencing purposes, *United States v. Tardiff*, 969 F.2d 1283, 1287 (1st Cir. 1992), and made clear at the sentencing that although the ultimate loss figure determined may not have been definitive, it was within an acceptable, accurate range as contemplated by the Sentencing Guidelines.

The petitioner has failed to demonstrate that his trial counsel's performance was deficient. Accordingly, the Court recommends that the motion be **DENIED without an evidentiary hearing**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Eugene W. Beaulieu
United States Magistrate Judge

Dated in Bangor, Maine, on March 24, 1997.